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IN THE

Supreme Court the of United States

OCTOBER TERM, 1961

No. 824

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

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TABLE OF CONTENTS.

	PAGE
JURISDICTIONAL STATEMENT	1
Opinions Below	2
Jurisdiction	2
Statutes and Constitutional Provisions Involved	3
Questions Presented	6
Statement of the Case	7
The Questions Presented Are Substantial	9
I—Chapter 119 of the Laws of 1959 of the State of New Jersey (R.S. 2A:175-5.1 to 5.18) violates the 1st and 14th Amendments of the Constitution of the United States	9
A. It is a law respecting establishment of religion and prohibiting the free exercise thereof	9
B. It violates the equal protection clause of the Constitution of the United States	12
II—Appellant has been denied due process by virtue of his conviction herein	14
CONCLUSION	18
APPENDIX A—Opinions of the New Jersey Supreme Court	19
APPENDIX B—Opinion of the Hudson County Court	47
APPENDIX C—Decision of the Hudson County Court	51
APPENDIX D—Judgment of Affirmance of the New Jersey Supreme Court. Mandate on Affirmance	55
APPENDIX E—Order Denying Rehearing	56

Table of Cases.

	PAGE
Braunfeld v. *Brown*, 366 U. S. 599; 81 S. Ct. 1144; 6 L. Ed. 2d 563	7, 8, 10
Cohen vs. *Webb*, 175 Ky. 1 (Ct. of App. 1917)	15
Commonwealth vs. *Berson*, 15 Va. Law Reg. 920 (Cir. Ct. 1910)	15
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1901)	13
Everson v. *Board of Education*, 330 U. S. 1 (S. C. 1946)	11
Ford Motor Company vs. *New Jersey Department of Labor and Industry*, 5 N. J. 494, 502 (Sup. Ct. 1959)	15
Gallagher vs. *Crown Kosher Super Market*, 366 U. S. 617; 81 S. Ct. 1122	7, 8
Krieger vs. *State*, 12 Okla. Cr. 566 (Cr. Ct. of App. 1916)	15
Lanzetta vs. *New Jersey*, 306 U. S. 451 (1938)	3, 17
McGowan v. *Maryland*, 366 U. S. 420, 6 L. ed. 2d 393	8, 12, 15
Morey v. *Doud*, 354 U. S. 457 (1956)	3, 13
Murdock vs. *Pennsylvania*, 319 U. S. 1905 (S. C. 1943)	11
People ex rel. McCollum vs. *Board of Education*, 333 U. S. 203 (S. C. 1948)	11
Rosen vs. *State*, 15 Ohio D. 473 (Com. Pl. 1905)	15
Smith v. *Cahoon*, 283 U. S. 553 (1930)	3, 14, 17
Two Guys From Harrison v. *Furman*, 32 N. J. 199 (1960)	10, 13
Two Guys From Harrison-Allentown, Inc. v. *McGinley*, 366 U. S. 582, 6 L. ed. 2d 551	8
Winters v. *New York*, 333 U. S. 507 (1947)	3, 17

Statutes.

PAGE

Federal Constitution,

14th Amendment 12

New Jersey Constitution,

Article VI, Section II, Paragraph 2 1

Laws of 1959 (R.S. 2A:171-5-8 and 5.10),

Chapter 119 ..... 1, 2, 6, 7, 9

28 U. S. C. 1257(2) 2

Revised Statutes of New Jersey N. J. S. A. 2A:171-1 *et seq.*,

Chapter 171. 3

2A:171-4 ..... 3, 6, 7, 8, 9, 15, 16

2A:171-5.8 4

2A:171-5.10 5

2A:171-5.11 5

2A:171-5.12 6

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THE STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT.

Appellant, Dave Fass, appeals from a final judgment of the Supreme Court of New Jersey entered on November 6, 1961, rehearing denied December 11, 1961, in which that court affirmed the conviction of the appellant of violating Chapter 119 of the Laws of 1959 (R. S. 2A:171-5.8 and 5.10).

The Supreme Court of New Jersey is the highest state court available to the appellant. New Jersey Constitution, Article VI, Section II, Paragraph 2.

Pursuant to United States Supreme Court Rules 13(2) and 15, appellant files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction of this appeal and should exercise such jurisdiction in this case.

Opinions Below.

The opinions of the New Jersey Supreme Court (App. A, *infra*, p. 19) are reported in 36 N. J. 102 (diss. op. of C. J. Weintraub at p. 122; of J. Jacobs, at p. 126; of J. Schettino, at p. 127). The opinion of the Hudson County Court (App. B, *infra*, p. 46) is reported in 62 N. J. Super. 265. A previous decision of the Hudson County Court (App. C, *infra*, p. 50) is not reported.

Jurisdiction.

On November 29, 1959, the appellant was arrested and charged with violating Chapter 119 of the Laws of 1959 in that he sold a piece of carpet on Sunday. He was found guilty in the Municipal Court of West New York and appealed to the Hudson County Court. A trial de novo was had in the Hudson County Court and appellant was again found guilty and sentenced to pay a fine of $25.00 and costs. He appealed to the Appellate Division of the Superior Court and before argument in that court said appeal was certified by the New Jersey Supreme Court which affirmed the conviction by a vote of 4 to 3. The judgment of the New Jersey Supreme Court was entered on November 6, 1961 (App. D, *infra*, p. 54). Rehearing was denied on December 11, 1961 (App. E, *infra*, p. 55). The Notice of Appeal was filed with the Clerk of the New Jersey Supreme Court on February 1, 1962.

The jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey is conferred by 28 U.S.C. 1257 (2).

The following decisions sustain the jurisdiction of this Court to review the judgment of the Supreme Court of

New Jersey on appeal in this case: *Smith* v. *Cahoon*, 283 U. S. 553 (1930); *Winters* v. *New York*, 333 U. S. 507 (1947); *Morey* v. *Doud*, 354 U. S. 457 (1956); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1938).

Statutes and Constitutional Provisions Involved.

The provisions of the New Jersey statutes concerning the observance of the Sabbath Day (Ch. 171 of the Revised Statutes of New Jersey N. J. S. A. 2A:171-1 et seq.), the validity of which is drawn in question provides in pertinent part:

> "2A:171-4
>
> Immunity from prosecutions under certain circumstances and conditions.
>
> "If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the exercise of religious worthship, and if the work or labor for which such person is informed against was done and performed in his dwelling house or workshop, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise or other article or thing in the line of his busines or occupation."

"2A:171-5.8

Retail, wholesale or auction sale of certain articles on Sunday prohibited; violators as disorderly persons; penalties

"On the first day of the week, commonly known as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, to sell, attempt to sell or offer to sell or to engage in the business of selling, as hereinafter defined, clothing or wearing apparel, furnishings, household, business or office appliances, except as works of necessity and charity or as isolated transactions not in the usual course of the business of the participants.

"Any person who violates any provision of this act is a disorderly person and upon conviction for the first offense, shall pay a fine of $25.00; and for the second offense, shall pay a fine of not less than $25.00 or more than $100.00 to be fixed by the court; and for the third offense, shall pay a fine of not less than $100.00 or more than $200.00 to be fixed by the court, or in the discretion of the court, may be imprisoned for a period of not more than 30 days, or both; and for the fourth of each subsequent offense, shall pay a fine of not less than $200.00 or more than $500.00 to be fixed by the court, or in the discretion of the court, may be imprisoned for a period of not less than 30 days or more than 6 months, or both. A single sale of an article or articles of merchandise of the character hereinabove set forth to any 1 customer, or a single offer to sell an article or articles of such merchandise to any 1 prospective customer, shall be deemed to be and constitute a separate and distinct violation of this act. L. 1959, c. 119, p. 530, Section 1."

"2A 171-5.10 Definitions

" 'Home furnishings' includes items of equipment and furnishings used in a home or office, such as floor coverings • • •"

" 'Sell' means to enter into an agreement whereby the seller transfers ownership or property in the goods or an interest in the goods to the purchaser for a consideration, whether or not the transfer is for immediate or future delivery, and whether or not the transaction is regarded as absolute, conditional or secured, and whether or not immediate consideration is paid therefor. The acceptance of a deposit for future delivery of any such merchandise, whether or not immediate consideration is paid therefor, shall also be deemed a sale for purposes of this act.

" 'Offer to sell' means the acceptance of bids or proposals for the purchase of goods at a future date or the attempt to induce a sale as hereinabove defined, or the attempt to induce an immediate transfer of any such merchandise, but not to include advertising or display of any such merchandise which merchandise is not available for purchase on Sunday.

" 'Engage in selling' means the attempt to sell or to induce an immediate or future transfer of any such merchandise by describing, explaining, extoling or identifying any such merchandise while the seller is in personal contact with the potential purchaser. L. 1959, c. 119, p. 531, Section 3."

"2A 171-5.11

Additional remedy; liability of corporate officers and employees

"This act shall be construed as an additional remedy to secure proper Sunday observance and the directors, officers, managers, agents or employees of corporations shall be personally liable for the penalties hereinabove provided. L. 1959, c. 119, p. 533, Section 4.

"2A 171-5.12

Effective date; operative in counties upon adoption by voters; referendum

"This act shall take effect immediately but shall not become operative in any county unless and until the voters of the county shall determine by referendum held pursuant to this act[1] that the same shall apply therein. L. 1959, c. 119, p. 533, Section 5.

Questions Presented.

1. Whether Ch. 119 of the Laws of 1959 (R.S. 2A:171-5.1 to 5.18) is violative of the First and Fourteenth Amendments of the Constitution of the United States in that:

(a) It is a law respecting establishment of religion;

(b) It prohibits the free exercise of religion;

(c) It violates the equal protection clause of the Federal Constitution.

2. Whether this appellant is immune from prosecution for the violation of said law by virtue of R.S. 2A:171-4.

3. Whether this appellant has been denied due process by virtue of his conviction herein.

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[1] As of this writing L. 1959, c. 119 (N.J.S.A. 2A:171-5.8 et seq.) has become operative in thirteen of New Jersey's twenty-one counties. The status is as follows:

Adopted		Defeated	Not referred
Bergen	Middlesex	Burlington	Atlantic
Cumberland	Monmouth	Camden	Cape May
Essex	Morris	Ocean	Hunterdon
Gloucester	Passaic		Salem
Hudson	Somerset		Warren
Mercer	Sussex		
Union			

Statement of the Case.

This appeal involves the validity of the conviction of the appellant of the violation of Chapter 119 of the Laws of 1959. The facts are not at all in dispute.

Appellant sold carpeting in his store on Sunday, November 29, 1959. He is of the Orthodox Jewish faith and uniformly keeps the seventh day of the week as his Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation and devotes the day to the exercise of religious worship. He was found guilty of violating Chapter 119 of the Laws of 1959 (R.S. 2A:171-5.8 and 5.10) in the municipal court of West New York and was sentenced to pay a fine of $25.00. He appealed to the Hudson County Court, Law Division, and on a trial de novo was again found guilty and sentenced to pay a fine of $25.00 and costs. Both the fine and the costs were paid under protest.

He appealed to the Appellate Division of the Superior Court and before argument said appeal was certified by the New Jersey Supreme Court, which affirmed the conviction by a vote of 4 to 3.

The majority opinion (per Justice Francis) held that the Statute was constitutional on the ground that this Court had held similar Statutes constitutional in *Gallagher* vs. *Crown Kosher Super Market*, 366 U. S. 617; 81 S. Ct. 1122; 6 L. Ed. 2d 536 and *Braunfeld* v. *Brown*, 366 U. S. 599; 81 S. Ct. 1144; 6 L. Ed. 2d 563. It also held that the petitioner was not immune from prosecution by virtue of 2A:171-4 because he did openly expose to sale the articles in question. The opinion further suggested that if the majority had perchance misconstrued the language of Section 4 (2A:171-4) or misapprehended the intention of the Legislature in retain-

ing it, the Legislature should review and rephrase it "so as to leave no doubt as to the nature of the exemption provided." All three dissenting opinions held that the petitioner was immune from prosecution by virtue of section 4 because he did not "openly expose to sale" his goods and merchandise. Justice Schettino held that in addition thereto the statute was unconstitutional in that it violated the equal protection clause of the Federal Constitution and that the decisions of this Court in *McGowan* v. *Maryland*, 366 U. S. 420, 6 L. ed. 2d 393; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 6 L. ed. 2d 551; *Braunfeld* v. *Brown, supra;* and *Gallagher* v. *Crown Kosher Super Market, supra,* do not apply in view of the absence of a general New Jersey Statute designed to set aside Sunday as a day of rest and relaxation.

The Federal questions sought to be reviewed were raised in the Hudson County Court by a motion for judgment of acquittal at the end of the State's case and again at the end of the entire case on the ground of the unconstitutionality of the statute in question and on the further ground that defendant was immune from prosecution by virtue of the immunity section of the Act (R.S. 2A 171-4). The matter was briefed and the motions were denied in a memorandum decision on March 7, 1960. (App. C, *infra,* p. 51) and in the opinion of the Hudson County Court (App. B, *infra,* p. 47).

The Federal question was raised in the Appellate Court in the Statement of Questions Involved numbered 1, 3, 4, 5 of appellant's brief and appendix, and Points 1, 3 and 4 of appellant's argument in his brief and appendix at page 2, 12 and 14 respectively. The majority of the Supreme Court in its opinion rejected appellant's contentions.

The question of the vagueness of Section 4 was raised in the petition for rehearing, point III, page 3, based on the statement of the majority opinion as set forth in said point. This petition was denied.

The Questions Presented Are Substantial.

The New Jersey Supreme Court has held that Chapter 119 of the Laws of 1959 does not violate the 1st and 14th Amendments of the Federal Constitution and also that the immunity section of the Act (2A:171-4) is inoperative because the petitioner "openly" exposed to sale his merchandise. These holdings conflict with the decisions of this Court and as to the broad, constitutional questions, affect all citizens of the State of New Jersey who sell the five categories of goods prohibited by the Act, and as to the immunity section, affect all Orthodox and Conservative Jews and Seventh Day Adventists, Seventh Day Baptists and all other citizens of the State of New Jersey who believe that the seventh day of the week is the true Sabbath and observe it accordingly. The precise questions involved here have never been decided by this Court.

I.

Chapter 119 of the Laws of 1959 of the State of New Jersey (R. S. 2A:175-5.1 to 5.18) violates the 1st and 14th Amendments of the Constitution of the United States.

A. It is a law respecting establishment of religion and prohibiting the free exercise thereof.

The rationale of the decisions of this Court in the Sunday Closing Law opinions is set forth in McGowan *vs.* Maryland, *supra*, at page 445 where this Court held:

> "The present purpose and effect of most of them is to provide *a uniform day of rest for all citizens;* the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion *would give a constitutional interpretation of hostility to the public welfare* rather than one of mere separation of church and State." (Emphasis mine)

Thus this Court refused to hold the Sunday Closing Law of Maryland unconstitutional because it found that the discrimination against the minority must yield to the welfare of the community and its need for a general day of rest.

In New Jersey, however, we have no longer a general Sunday law. Our Supreme Court held, in *Two Guys From Harrison Inc.* vs. *Furman*, 32 N. J. 199 (1960) at page 225, that "Chapter 119 repealed and superseded N. J. S. 2A: 171 2, 2 and 6 to 12."[2] Absent a general Sunday closing law, the infirmities of Chapter 119 of the Laws of 1959 take on additional substance and weight. This Court has already noted in *Braunfeld* vs. *Brown*, 366 U. S. 599, at page 605, that such laws operated so as to make the practice of the religious beliefs of Orthodox Jews more expensive. They do incur economic disadvantage by being forced to keep closed two days a week, whereas non-Sabbatarians must

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[2] Justice Francis in his dissenting opinion in Two Guys From Harrison, supra, says at page 254, "the result of the majority's decision is that the State no longer has a general law designed to set aside Sunday as a day of rest and relaxation. There is now no legislative recognition of such a day." Justice Schettino in his dissenting opinion in State v. Fass 36 N. J. 102 (S.C. 1961) at page 127 also notes the absence of a general New Jersey statute designed to set aside Sunday as a day of rest and relaxation.

keep closed only one day a week. In addition thereto the Statute would tend to force people of lukewarm faith to give up the practice of their religion and, by keeping their business open on Saturday, would influence them to remain away from their church. Thus this statute becomes subject to the infirmities found by this Court in People ex rel. *McCollum* vs. *Board of Education*, 333 U. S. 203 (S. C. 1948). See also *Everson* v. *Board of Education*, 330 U. S. 1 (S. C. 1946), and *Murdock* vs. *Pennsylvania*, 319 U. S. 1905 (S. C. 1943) where this Court said at page 111:

> "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

The uncontradicted testimony of Rabbi Sidney B. Hoenig (see appellant's brief and appendix p. 20a, lines 1 to 15) is that any Jew who would be forced to observe Sunday would virtually be forced to consider the divinity, the messiahship of Jesus.

For thousands of years abstaining from work has been a form of worship or at least a recognition of the day on which work was interdicted as a holiday. In Exodus XII, we find:

> "16. And in the first day there shall be to you a holy convocation, and in the seventh day a holy convocation; no manner of work shall be done in them, save that which every man must eat, that only may be done by you."

The five major holidays of the Jews are set forth in Leviticus XXIII. See also Numbers XXVIII, 18, 25, 26; XXIX, 1, 7, 12; Deuteronomy V, 12, 13, 14.

It will be noted that whenever the Bible speaks of a "holy convocation" it also prohibits the doing of work.

Thus the prohibition against work is definitely a form of worship, or at least a recognition that the day is a day of "holy convocation."

It cannot be denied that Sunday is a holy day for most of the Christian sects. This Court admits in *McGowan* v. *Maryland, supra*, at page 445 that Sunday is a "day of particular significance for the Christian sect."

The vast majority of Christians in this country, even if they do not go to church regularly, still believe that Sunday is a holy day. The testimony of Dr. Hoenig points out that to force the appellant to observe Sunday would be forcing him to acknowledge the religious importance of that day.

This legislation in its operative effect uses the State's coercive power to aid religion and invidiously discriminates against appellant's right to practice his religion.

It is therefore respectfully submitted that the statute sub judice does violate the establishment and the free exercise clauses of the Federal constitution.

B. It violates the equal protection clause of the Constitution of the United States.

Besides its unconstitutionality on the ground of its violation of the establishment and exercise of religion clauses of the Federal Constitution, the statute has another defect. The classification of goods and merchandise forbidden to be sold under this Act is so illusory, arbitrary and capricious that it deprives the defendant of his liberty and property in violation of the due process and equal protection concepts contained in the 14th Amendment.

Again it must be noted that New Jersey has no broad or general Sunday closing law. The legislature arbitrarily picked out five groups of retail merchants and forced them to close their businesses on Sundays, and that only in

thirteen of the State's twenty-one counties. Merchants in the eight remaining counties in similar businesses may keep open seven days a week. Even in the thirteen counties where such sales are prohibited, manufacturing of the very items prohibited from sale is permitted. Stores are not required to be closed and the Sunday ban sub judice affects less than 8.9% of the workers of this State (see dissenting opinion of Justice Francis in *Two Guys From Harrison* vs. *Furman*, *supra*, at page 239.)

In *Morey* v. *Doud*, 354 U. S. 457 (1956) this Court said at page 465:

> "• • • a statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which it is found."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1901), the Court said at page 563:

> "In prescribing regulations for this conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. • • • It is quite a different thing for the State under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

In *Smith* vs. *Cahoon*, 283 U. S. 553 (1930), this Court held, p. 566:

> "The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court (citing cases). But the Constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action.

This Court then held that giving a bond or an insurance policy relates to the public safety and went on to say, p. 567:

> "So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having a relation to the purpose for which it is made.' "

The Act *sub judice* is arbitrary and discriminatory in its classification and is therefore unconstitutional.

II.

Appellant has been denied due process by virtue of his conviction herein.

The legislature of the State of New Jersey has granted an immunity to Sabbatarians from the effect of Sunday laws, provided (1) they did not disturb other persons in

the observance of Sunday and (2) they did not openly expose to sale their merchandise in the line of their business or occupation (R. S. 2A:171-4). This immunity section has been part of the laws of the State of New Jersey since 1798 and has come down throughout all subsequent revisions practically unchanged. The testimony was uncontradicted that no one had been disturbed in observance of the first day of the week as the Sabbath by any acts of the petitioner. It is also admitted that the defendant had exposed to sale his merchandise. The question was whether he had *Openly* exposed to sale.

Counsel has read the immunity sections contained in the statutes of all the states referred to in Appendix 2 of the opinion of Mr. Justice Frankfurter in McGowan *vs.* Maryland, supra, and has been unable to find any statute which refers to "open" exposure to sale. When we find that the interdictory statute (R. S. 2:207-6) forbade anyone to cry, show forth, expose to sale or sell or barter, we must take the words "openly expose to sale" to mean an exposure to sale more notorious than merely exposing to sale. The dissenting opinion of Chief Justice Weintraub in this case, it is submitted, correctly sets forth the intent of the legislature in that respect, for as is said in *Ford Motor Company* vs. *New Jersey Department of Labor and Industry*, 5 N. J. 494, 502 (Sup. Ct. 1959) "it is to be presumed that the legislature has not made use of superfluous words."

The immunity sections in other states have been liberally construed. See *Commonwealth* vs. *Berson*, 15 Va. Law Reg. 920 (Cir. Ct. 1910), *Cohen* vs. *Webb*, 175 Ky. 1 (Ct. of App. 1917), *Rosen* vs. *State*, 15 Ohio D. 473 (Com. Pl. 1905).

In *Krieger* vs. *State*, 12 Okla. Cr. 566 (Cr. Ct. of App. 1916) the Court said:

> "And when our legislators exempted persons who uniformly, conscientiously and religiously keep another day from the penalties of the statute, *they intended to give them a substance and not a shadow.* Hence we think the Legislature intended to use the word 'servile' as synonymous with 'secular.'" (Emphasis mine)

The majority opinion in this case admits that there are no decisions construing the phrase "openly expose to sale." It seems to rest its construction on the instructions given the informers in England in 1693 (See *State* vs. *Fass, supra,* pp. 114-115; App. A, p. 31). It is thus respectfully submitted that the majority of the Supreme Court erred in construing the phrase "openly expose to sale" and that the defendant is immune from prosecution by virtue of the statute 2A:171-4. By this construction it invalidated the exception in the immunity statute.

This section of the statute, as construed by the New Jersey Supreme Court, is invalid because of its vague and doubtful meaning. The majority opinion of the Supreme Court in *State* vs. *Fass, supra,* at page 121 (App. A, p. 39), says:

> "If, perchance, we have misconstrued the language of section 4, or misapprehended the intention of the Legislature in retaining it, particularly in the 1937 and 1951 revisions, having in mind the sensitive problem involved, we trust that the lawmakers will review and rephrase it *so as to leave no doubt as to the nature of the exemption provided.*" (Emphasis mine)

Evidently even the majority had a doubt as to the nature of the exemption provided.

The test of due process is set forth in *Lanzetta* vs. *New Jersey*, 306 U. S. 451 (1938), where this Court said, at page 453:

> "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids * * * And a statute which either forbids or requires the doing of any act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Smith* v. *Cahoon*, *supra*, this Court said at p. 564:

> "The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of this resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord."

In *Winters* v. *New York*, 333 U. S. 507 (1947) this Court said at p. 515:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness' (citing cases). There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to the persons within the scope of the act, Lanzetta *v.* New Jersey, 306 U. S. 451 or in regard to the applicable tests to ascertain guilt."

If Section 4 of the Act sub judice is so vague that the majority of our Supreme Court felt it should be clarified,

it clearly contravenes due process. Not only that, but our Supreme Court is practically equally divided on the meaning of this section. Four Justices give it one meaning; three an opposite meaning. They differ as to its application. How then can this section be considered so explicit to an ordinary layman that he may know what acts it is his duty to avoid? It must be borne in mind that this is a criminal case and the statute must be so clear that men of common intelligence shall not be required to guess at its meaning or to differ as to its application.

Conclusion.

The questions presented by this appeal vitally affect the liberty and property of a great number of citizens of the State of New Jersey. They are substantial and of widespread public importance. It is respectfully submitted that this Court should note probable jurisdiction, grant plenary consideration of the Constitutional issues involved and order briefs and oral argument.

Respectfully submitted,

JOSEPH L. FREIMAN,
Atttorney for Appellant.

APPENDIX A.

Opinions of the New Jersey Supreme Court.

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

DAVE FASS,
Defendant-Appellant.

Argued September 13, 1961—Decided November 6, 1961.

* * * * * *

Mr. ROBERT S. MILLER, Deputy Attorney General, argued the cause for plaintiff-respondent (Mr. DAVID D. FURMAN, Attorney General of New Jersey, attorney).

Mr. JOSEPH L. FREIMAN argued the cause for defendant-appellant.

The opinion of the court was delivered by FRANCIS, J.

Defendant Dave Fass operates a store in West New York, New Jersey, for the retail sale of floor coverings. He was charged in the Municipal Court with making a sale of merchandise there on Sunday in violation of L. 1959, Chapter 119, §§ 1 and 3, N. J. S. 2A:171-5.8 and 5.10. He admitted the sale but defended on the ground that the statute is invalid because it interferes with the free exercise of his religion in violation of the First Amendment of the United States Constitution (which is applicable to the states by virtue of the Fourteenth Amendment of that Constitu-

tion), and of Article I, paragraphs 4 and 5, of the New Jersey Constitution. In addition, he claimed to be immune from prosecution under N. J. S. 2A:171-4 as a Sabbatarian. He was convicted in the Municipal Court and the judgment was affirmed on a trial *de novo* in the County Court. His subsequent appeal was certified by this court before argument in the Superior Court, Appellate Division. After the matter was presented to us the United States Supreme Court on June 19, 1961 decided a series of cases involving attacks upon the constitutionality of the Sunday closing laws of Maryland, Massachusetts and Pennsylvania. All of the various claims of invalidity were rejected, including the contentions that such statutes violated the equal protection clause of the Fourteenth Amendment and the religious freedom guaranty of the First Amendment of the Federal Constitution. See *McGowan* v. *State of Maryland*, 366 U. S. 420, 81 S. Ct. 1153, 1218, 6 L. Ed. 2d 393; *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551; *Braunfeld* v. *Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563. In the light of those determinations, we called for additional briefs and reargument.

Section 1 of Chapter 119, L. 1959, provides:

> "On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, *to sell, attempt to sell or offer to sell or to engage in the business of selling,* as hereinafter defined, clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings, household, business or office appliances, except as works of necessity or charity or *as isolated transactions not in the usual course of the business of the participants.*" (Emphasis added)

Section 3 says that "sell" means

> " * * * to enter into an agreement whereby the seller transfers ownership or property in the goods or an interest in the goods to the purchaser for a consideration, * * *."

"Offer to sell" means

> " * * * the acceptance of bids or proposals for the purchase of goods at a future date or the attempt to induce a sale as hereinabove defined, or the attempt to induce an immediate transfer of any such merchandise, *but not to include advertising or display of any such merchandise which merchandise is not available for purchase on Sunday.*" (Emphasis added)

"Engage in selling" means

> " * * * the attempt to sell or to induce an immediate or future transfer of any such merchandise by describing, explaining, extolling or identifying any such merchandise while the seller is in personal contact with the potential purchaser."

The constitutionality of the statute was sustained by a majority of this court in *Two Guys from Harrison* v. *Furman*, 32 N. J. 199 (1960), against charges that it imposed discrimination upon and denied equal protection of the law to persons who were engaged in the business of selling articles in the five forbidden categories. Also rejected was the contention that the legislation transgressed the prohibition of the Federal and State Constitutions against the enactment of laws "respecting an establishment of religion" or "of one religious sect in preference to another." First Amendment, United States Constitution; Article I, par. 4, New Jersey Constitution. That decision must be regarded as having established the present law of this State.

Reserved by the opinion, however, was the question whether the ban on Sunday sales in the listed classes of commodities impinged "upon the freedom of those who observe religiously the seventh day of the week." The issue was not presented and no view was expressed on it. 32 N. J., at pp. 216, 217. This case brings it to us for the first time.

Fass is a votary of the Orthodox Jewish faith. The tenets of his religion require him to keep, and he does keep, the seventh day of the week as his Sabbath. On that day he abstains from his usual business or occupation and devotes himself exclusively to religious worship. His Sabbath begins at sundown on Friday (at which time he closes his store) and ends at sunset on Saturday. Thus, his store is closed two days each week: on Saturday, because of the spiritual proscriptions of his religious orthodoxy, and on Sunday, through compulsion of secular law, L. 1959, Chapter 119, while his business competitors of other faiths, or of no faith at all, are prohibited from engaging in traffic in the five classes of goods only on one day of the week, *i. e.*, Sunday. The resulting additional economic loss imposed on him by the statute makes the practice of his religion more burdensome and therefore, he claims, constitutes an unconstitutional hindrance to its free exercise.

The precise question was considered in *Braunfeld* v. *Brown* and *McGowan* v. *State of Maryland*, *supra*, and disposed of adversely to the defendant by a majority of the members of the United States Supreme Court. In *Braunfeld*, Chief Justice Warren declared that the Pennsylvania Sunday closing Law (18 P. S. § 4699.10) was simply a regulation of secular and not of religious activity, designed by the legislative branch of the government to secure in each week a common day of rest, relaxation and recreation for all persons. 366 U. S., at p. 604, 81 S. Ct., at p. 1147, 6 L. Ed. 2d, at p. 567. In answer to the argument that the basic purpose would be served by selection of some day other than Sunday or by permitting each person to decide

upon his own day of abstinence from work, both the Chief Justice, and Justice Frankfurter in his exhaustive concurring opinion, said a state might reasonably conclude that the suggested alternatives would not provide for the desired general cessation of activity or the sought for atmosphere of rest and tranquility; that they would provide only periodic rest, not the atmosphere of entire community repose which Sunday has traditionally brought. *McGowan* v. *State of Maryland, supra*, 366 U. S., at pp. 449, 505, 506, 81 S. Ct., at pp. 1117, 1178, 1179, 6 L. Ed. 2d, at pp. 413, 414, 444, 445; see also *Two Guys from Harrison* v. *Furman, supra*, 32 N. J., at pp. 215, 216.

In *McGowan* and *Braunfeld* it was further contended that in view of the indirect economic burden cast on Sabbatarians, conformity with the guaranty of freedom of religion as to them could be achieved only by legislative grant of an exemption from the restrictions of Sunday closing statutes. Here again, the court ruled adversely, holding that such a qualification was a matter of legislative judgment and not necessary to constitutional regularity. In *Braunfeld* v. *Brown* Chief Justice Warren said:

> "However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State's interest in having all people rest one day would be satisfied.
>
> A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the

exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity." 366 U. S., at p. 608, 81 S. Ct., at p. 1148, 6 L. Ed. 2d., at p. 569.

Justice Frankfurter reached the same conclusion on this problem. He said:

> "In urging that an exception in favor of those who observe some other day as sacred would not defeat the ends of Sunday legislation, and therefore that failure to provide such an exception is an unnecessary—hence an unconstitutional—burden on Sabbatarians, the *Gallagher* appellees and *Braunfeld* appellants point to such exceptions in twenty-one of the thirty-four jurisdictions which have statutes banning labor or employment or the selling of goods on Sunday. Actually, in less than half of these twenty-one States does the exemption extend to sales activity as well as to labor. There are tenable reasons why a legislature might choose not to make such an exception. To whatever extent persons who come within the exception are present in a community, their activity would disturb the atmosphere of general repose and reintroduce into Sunday the business tempos of the week. Administration would be more difficult, with violations less evident and, in effect, two or more days to police instead of one. If it is assumed that the retail demand for consumer items is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position, presumably, to complain of discrimination against *his* religion. Employers who wished

to avail themselves of the exception would have to employ only their co-religionists, and there might be introduced into private employment practices an element of religious differentiation which a legislature could regard as undesirable. [366 U. S., at p. 514, 81 S. Ct., at p. 1183, 6 L. Ed. 2d, at pp. 449, 450]

In view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the nonexempting Sunday statutes an impermissible imposition upon the Sabbatarian's religious freedom? Every court which has considered the question during a century and a half has concluded that it is not. This Court so concluded in *Friedman* v. *New York*, 341 U. S. 907, 95 L. Ed. 1345, 71 S. Ct. 623. On the basis of the criteria for determining constitutionality, as opposed to what one might desire as a matter of legislative policy, a contrary conclusion cannot be reached." 366 U. S., at p. 522, 81 S. Ct., at p. 1187, 6 L. Ed. 2d, at pp. 453, 454.

Reference is made to these portions of the Federal cases to demonstrate that a Sunday closing law otherwise valid is not invalidated because it does not contain any exemption for persons whose religious beliefs require them to observe Saturday or some other day of the week as their Sabbath. For example, Moslems choose Friday; Buddhists, a day which is determined by the phases of the moon and may vary from week to week. "Sunday Legislation," 73 Harv. L. Rev. 729, 734, n. 55 (1960). The New Jersey Sunday Closing Act, N. J. S. 2A:171-4, however, does contain an excepting clause for Sabbatarians, which is claimed to be applicable in the present controversy. Its limited operative effect, however (to be discussed hereafter), makes relevant the expressed view that no such clause is necessary to satisfy the constitutional requirements for religious freedom.

The effect of the four Federal cases to which we have referred and the concordant majority decision of this court in *Two Guys from Harrison* v. *Furman, supra*, is to establish that L. 1959, Chapter 119, does not deprive retail merchants of equal protection of law. The present writer, who dissented in *Two Guys*, bows to those judgments. My associates of the majority in this case originally held the view that prevailed. The Federal cases demonstrate also that the designation therein of Sunday as the common day of rest and recreation, does not infringe invidiously upon organic safeguards for the free exercise of religious beliefs, and that it does not constitute the act as one "respecting an establishment of religion" or as establishing or tending to establish "one religious sect in preference to another." Selection of one fixed day in seven in aid of community need and desire for respite from ordinary business activity is a matter of legislative policy, judgment and discretion. So long as the choice does not transgress constitutional limitations, the wisdom of the action is solely within the ambit of the legislative branch of the government.

Thus we are brought to consideration of the final facet of Fass' defense. He argues that because of the exception granted to him as a Sabbatarian under 2A:171-4, the sale of carpeting cannot be considered a violation of L. 1959, Chapter 119.

Section 4, which is said to grant the immunity, first appeared in the general Sunday Closing Act of 1798, Paterson's Laws, p. 329. The language of the section was substantially the same then as it is now. It provides:

> "If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the

> exercise of religious worship, and if the work or labor for which such person is *informed against* was done and performed in his dwelling house or workshop, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person *to openly expose to sale* on Sunday any goods, wares, merchandise or other article or thing in the line of his business or occupation." (Emphasis added)

Defendant's right of exoneration, therefore, depends upon the nature of this exception, and, more specifically, whether he "openly" exposed "to sale" goods "in the line of his business or occupation."

Before turning to a study of the statute, the nature of defendant's business and its operation on Sunday should be set forth.

Fass and his brother-in-law operate a store for the retail sale of floor coverings (carpeting, linoleum, etc.) at the corner of Bergenline Avenue and 61st Street, West New York, New Jersey. Floor coverings are specifically included as "home furnishings" within the Sunday sale ban. 2A: 171-5.10. The store has a full glass front and side on the two streets, the glass, about 11 feet high, extending from the sidewalk to the ceiling level. There are double entrance doors, also of glass. The full interior of the store can be seen from the public sidewalk. The ordinary person approaching the place would realize that the business being conducted there was the sale of floor covering. As Fass described the scene, it is not necessary to put or keep goods in or at the window because "you can see the whole store through the window."

Fass closes the establishment a half hour before sunset on Friday and opens again for business about 20 minutes

after sunset on Saturday. In order to communicate the fact of his Sabbath closing to the public, a sign is placed in the window saying that the store is closed on Saturday and will reopen after sunset. Additionally, advertisements to that effect are placed in a newspaper. That practice has been followed since the inception of the business in 1946.

Since 1956, however, the store has been open to the public for business on Sunday. Of course, the Sabbath closing sign is out of the window on Sunday and the sales operations on that day are precisely the same as on week days. The situation existing on the Sunday of the sale which resulted in these proceedings is illustrative of normal operation. According to the officer who made the arrest, the physical condition of the store was as described above. The entrance door was open for admission of the public; the lights were on and four or five salesmen in addition to Fass were on duty when the sale of carpeting was made.

The record indicates that since the arrest Fass works in the store on Sunday, apparently preparing for Monday operation; but the premises are not open to the public for business. The work or labor Fass now engages in on Sunday is no longer the subject of any prohibition; nor would there be any ban on public Sunday sale of goods or commodities other than those enumerated in L. 1959, Chapter 119. *Two Guys from Harrison* v. *Furman*, *supra*, at p. 225.

On the facts outlined, the crucial question is: Did Fass "openly expose to sale on Sunday any goods, wares, merchandise or other article or thing in the line of his business or occupation"? If so, he cannot claim the benefit of the exemption. A broader question is inherent in the statutory language: regardless of the construction of "openly expose to sale," is not an actual sale of a commodity in the line of his business proscribed whether or not accompanied by open exposure of the commodity? That actual sale is not permitted under the section 4 exception has been assumed by some persons who have written on the subject. See con-

curring opinion of Justice Frankfurter in *McGowan* v. *State of Maryland, supra,* 366 U. S., at p. 515, 81 S. Ct., at p. 1183, 6 L. Ed. 2d, at p. 449 & n. 103; "Sunday Legislation," 73 Harv. L. Rev., *supra,* at p. 733 & n. 47; 743 & n. 91. We pass that problem, however, to deal with the issue in the fashion in which defendant presents it here. In doing so, we shall assume broadly that work or labor as used in section 4 comprehends sales of goods. See *Harris, Treatise on Sunday Laws* (1892), at p. 92.

Defendant contends that "openly expose to sale" in the light of the antiquity of the Sunday Closing Law of 1798 (the substance of which, excluding section 4, was declared repealed by implication in *Two Guys from Harrison*) has a limited significance. He claims that immunity from prosecution is granted to all Sabbatarians, who observe Saturday religiously as described in section 4, and who do not sell their goods by hawking or crying them in the public streets or by maintaining open stands on the public streets or sidewalks, or, more generally, who do not conduct their business of selling in such manner as to interfere with or disturb the peace and tranquility of those seeking rest, recreation and diversion on Sunday. We cannot agree.

Our first comprehensive Sunday closing legislation appeared in 1798. It forbade "travelling, worldly employment or business, ordinary or servile labor or work, * * * (works of necessity and charity excepted)" and ordained that "no person shall cry, shew forth, or expose to sale, any wares, merchandises, fruit, herbs, meat, fish, goods or chattels, upon the first day of the week, commonly called Sunday, or sell or barter the same * * *." Paterson's Law, 1798, p. 329, §1. Section 4, containing the exception for Sabbatarians, appeared substantially in the form quoted above.

This act, like most of those adopted in this country, traces back to 29 Charles II, chapter 7, in 1677, which provided that "* * * no tradesman, artificer, workman, labourer or other person whatsoever, shall do or exercise any worldly

labor, business or work of their ordinary callings, upon the Lord's Day, or any part thereof (works of necessity and charity only excepted) * * * and that no person or persons whatsoever, shall publickly cry, shew forth, or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels whatsoever, upon the Lord's Day or any part thereof * * *."

It will be observed that labor, business or work, or the public crying, showing forth or exposing to sale of goods in the ordinary calling was proscribed. In England this language was held to relate only to transactions or sales made in the course of a person's regular business, *i.e.*, those things which the ordinary duties of the trade or business bring into continued action. *Drury* v. *Defontaine*, 1 Taunt. 131, 127 E. R. 781 (C. P. 1808); *Rex* v. *Whitnash*, 7 Barn. & C. 595, 108 E. R. 845 (1827); *Scarfe* v. *Morgan*, 4 M. & W. 270, 150 E. R. 1430 (1838); 1 N. J. L. J. 311, 312, 313; *Harris, op. cit. supra*, at pp. 36-40; Story on Sales (1862) 638. In this country, and particularly in New Jersey, many legislatures undertook to avoid that limitation on the observance of Sunday as a day of rest and relaxation. 1 N. J. L. J., *supra*, at p. 313. The purpose was accomplished here by exscinding the reference to "ordinary callings," and enacting that "no travelling, worldly employment or business shall be done on Sunday." Speaking of the earlier construction, Chief Justice Beasley in *Reeves* v. *Butcher*, 31 N. J. L. 224, 226 (Sup. Ct. 1865), and criticizing an earlier opinion of the court in *Crocket* v. *Vanderveer*, 3 N. J. L. 422, 424 (Sup. Ct. 1811), said:

> "A regulation thus mutilated does not appear to have recommended itself to the framers of our statute, and hence the inhibition of all 'worldly employment or business.' The terms are comprehensive, and the legislative intent manifest. In my opinion, the effect of the provision is to annul every transaction which, if performed on a week day, would be enforceable in

a court of justice. Bating the cases taken out of the general rule by the act itself, there can be no such thing as a suable contract made in this state on a Sunday."

The effect of the more comprehensive exclusion in our act of 1798 was to condemn all sales on Sunday whether public or private, irrespective of whether they were in the ordinary calling of the seller. Oddly enough, the broader language was not carried into the section 4 exemption for Sabbatarians. There, as has been noted, the immunity from prosecution does not apply where there is an open exposure to sale of goods or merchandise "in the line of his business or occupation." In this context, however, the quoted words are simply words of identification; they mean that there shall be no open exposure to sale of the goods the Sabbatarian is in the business of selling.

We have been unable to locate any decision of the English courts construing the language in 29 Charles II, chapter 7, that "no person shall publickly cry, shew forth or expose to sale" any merchandise. It does seem obvious that the mere public or open exposure of the goods "to sale," completed the offense. Actual sale was not necessary. This is indicated by the last part of the clause saying that the offender "shall forfeit the same goods so cried, or shewed forth, or exposed to sale." In any event, it seems reasonable to conclude that the basic intention of the statute was to prevent on Sunday such conduct or action on the part of a person, whose ordinary calling or business was the selling of certain goods, as would indicate plainly to the public that he was open for business and his goods were available for sale.

Light may be gained, however, on the meaning of the clause under study by reference to the history of enforcement of 29 Charles II, chapter 7. On three occasions between May 30, 1660 and August 1663, Charles II had issued a proclamation against "vicious debauched and profane persons," urging the magistrates to enforce the laws against all such

persons. Neither these proclamations nor the 1677 Sunday Act, nor other existing penal laws evoked a satisfactory response. Beginning with 1690, various voluntary societies of citizens came into being to awaken the "sleeping vigor" of the laws against vice and immorality and "by prudent and Christian methods to forward the due execution of them." It was part of their operation to give information to the magistrates on violations of such laws, and they made solemn agreements among themselves and with public officials as to the manner of performing their functions. Written instructions were given to the informers as to circumstances which were to be regarded as sufficient to warrant an information. Radzinowicz, A History of English Criminal Law (1957), Vol. 2, pp. 4-8; Vol. 3, Chap. 7, *passim*. With regard to the enforcement of the section of the Sunday law with which we are concerned, the instructions given in 1693 as to the proof justifying action, were:

> "As to ye Crime of exposing goods to Sale on the Lords day if it be by those that live in Cellars unless the goods are exposed without the doores of the Cellar they are advised not to inform agt them tho they be all round the Staires because such persons have a just excuse for keeping open their Cellar door for ye benefitt of the light but if they be seen selling then they may be informed agt for exercising their ordinary calling Provided ye persons yt informed agt ym be not the Buyer And if any Ware fruit &c be exposed without ye door of ye Cellar or in any Shop with ye window open or on any stall wether belonging to ye person that owes such goods nor not tho there be nothing seen to be sold That is a sufficient ground of Information." Radzinowicz, *supra*, Vol. 2, Appendix 1, pp. 431-38, referring to "An Agreement of Divers Gentlemen and Citizens in and about London for promoting the execution of the Lawes made against profaness and debauchery" of June 8, 1693, and "An

Agreement of Divers Constables and Other Officers of London" (no date, but probably slightly later. Id. Vol. 2, p. 5) to be found in M.S. Rawl. D. 129 ff. 1-2 and 29-31 (Bodleian Library).

Relatively few instances are to be found in the United States of judicial construction of phrases like "openly expose to sale." The early statute in New York decreed that "No person shall expose to sale any wares, merchandise, fruits, herbs, goods or chattels on Sunday." 1 R. S., p. 676, sec. 71. It was held to apply only to "the public exposure of commodities to sale in the streets, or in stores and shops, warehouses or market places." A private, casual contract or sale on Sunday was not invalidated thereby, at least if it did not violate or tend to violate the public quiet or solemnity of the day. *Boynton* v. *Page*, 13 Wend. 425 (N. Y. Sup. Ct. 1835); *Miller* v. *Roessler*, 4 E. D. Smith 234 (N. Y. C. P. 1855); *Ratsford* v. *Every*, 44 Barb. 618 (N. Y. Sup. Ct. 1865); *Eberle* v. *Mehrbach*, 55 N. Y. 682 (Ct. App. 1874); *People* v. *Oser*, 170 N. Y. S. 2d 277 (City Mag. Ct. 1958); Harris, *op. cit. supra*, p. 131; 83 C. J. S. Sunday §15. In Minnesota the statute prohibited public selling and offering for sale publicly of property on Sunday. The Supreme Court of that State, in discussing the nature of the offense, said:

> "There is no inhibition in the statute upon a private casual sale, as were those now in dispute * * *. The prohibition extends to public sales and publicly offering for sale only. The statute does not cover or affect contracts or casual sales made privately, and without violating, or tending to produce a violation of, the public order and solemnity of the day." *Ward* v. *Ward*, 75 Minn. 269, 77 N. W. 965 (1899).

And see *State* v. *Hogan*, 212 Mo. App. 473, 252 S. W. 90 (Ct. App. 1923); *State* v. *Campbell*, 206 Mo. 579, 105 S. W. 637 (1907).

Some enactments forbid the keeping of open shop or open store. This has been said to mean more than just having the door open. It means keeping the door open and the exposition of goods there for the purpose of sale to the public. An actual sale need not be proved, however, to establish the offense. *City of Gulfport* v. *Stratakos*, 90 Miss. 489, 43 So. 812 (Sup. Ct. 1907); *Jebeles* v. *State*, 131 Ala. 41, 31 So. 377 (Sup. Ct. 1902); *Commonwealth* v. *Dextra*, 143 Mass. 28, 8 N. E. 756 (Sup. Jud. Ct. 1886). Whether the doors are open or closed, though an element to be considered, is not of vital importance. It is sufficient if the merchant in some way discloses his willingness to afford admittance to those who apply for the purpose of buying or trading in his merchandise, and keeps his store in such condition that access may be had to it on the Sabbath. *Dixon* v. *State*, 76 Ala. 89 (Sup. Ct. 1884); *Snyder* v. *State*, 59 Ala. 64 (Sup. Ct. 1877); *Commonwealth* v. *Lynch*, 74 Mass. 384 (Sup. Jud. Ct. 1857).

The New Jersey Legislature ordained in 1798 and continued the mandate in the 1937 and 1951 Revisions (N. J. S. 2A:171-4) that section 4 shall not be construed to allow a Sabbatarian to openly expose to sale any merchandise in the line of his business or occupation. We are convinced from our study of the problem that a merchant, prior to the adoption of L. 1959, Chapter 119, who religiously observed Saturday as his Sabbath, could not claim the immunity if he opened his store or shop to the public on Sunday for the ordinary operation of the business regularly conducted therein. If his place was open for the purpose of doing business indiscriminately with the public in the goods or wares usually sold therein, there was an open exposure to sale within the statutory proviso. Clearly the conduct of defendant's business as described above would have rendered the immunity inapplicable prior to 1959.

The state of Sunday closing regulation in New Jersey since enactment of L. 1959, Chapter 119, indicates that the same view must be taken now. Apart from (1) the infer-

ences to be drawn from both the history of Sunday closing legislation in England and in this country, (2) the plain meaning of the proviso withdrawing the immunity where the Sabbatarian openly exposes his goods to sale in the regular course of business, and (3) the emphatic language of Chapter 119 forbidding sale, attempt to sell, offer to sell, or engaging in the business of selling the listed items, the conclusion we have reached is expressive of the rationale of *Two Guys from Harrison*. The constitutionality of the limited Sunday restriction of Chapter 119 was sustained generally in that case on the theory that it probably represented an effort on the part of the Legislature to strike at the public evil associated with Sunday business activity where it was most pronounced. The court said:

> "The legislative body may upon that approach classify operations upon such considerations as the amount of traffic, noise, or other bustle, and weigh those factors against, not necessity or charity, but rather relative utility and convenience to the public. * * *.
>
> Here the broad power to classify discussed in Holderman, *supra*, (24 N. J., at pages 300-305), comes into play. In the absence of a compelling showing to the contrary, we must assume, as the facts may reasonably be, that the Legislature found the items dealt with by chapter 119 are the ones which, above and beyond all others, *are provocative of the problem; that the elimination of their sale on Sunday will remove the undue interference with the opportunity* of the citizens for relief from the stress of everyday pursuits. Upon the stated thesis, the Legislature may indeed hit the evil where it is felt most in its quest for a reasonable balance of the interests involved." 32 N. J., at pages 228, 229. (Emphasis added)

With the *Two Guys* decision, the general closing Act, 2A:171-1, 2 and 6 to 12, vanished from the scene. The ban

imposed thereby on worldly employment or business no longer exists. In its place is L. 1959, Chapter 119, which forbids only sale or offer or attempt to sell goods in the five categories specified. (The law becomes operative only in those counties which adopt it by referendum. It has been approved in only 12 counties thus far, Hudson County being one of them. Three counties have rejected it. So in nine counties Sabbatarians are free to conduct their businesses on Sunday, at least in the absence of a municipal closing law.) All other forms of business or labor (not otherwise illegitimate) may be pursued in freely on Sunday, and all persons may engage in them whether Sabbatarians or otherwise. Only those Sabbatarians in the 12 counties referred to, who sell goods in the five classes, are prevented from selling on Sunday; and even they can work about their stores on or in connection with such articles, providing they do not open their places of business to the public for the purpose of selling or offering or attempting to sell them. And if such Sabbatarians deal in articles or merchandise that are not within the prohibition, they are free to open their places of business to the public on that day. Moreover, if they are in the business of selling other goods or articles, as well as those banned from sale or offer of sale, their shops may properly be opened for regular disposition of the non-prohibited items. In this situation may well be found an illustration of the operation of the legislative order against openly exposing to sale the five excluded classes of merchandise. Such vendors of both excluded and permitted articles may have their shops open to the public for business as usual, and they will not be regarded as openly exposing to sale the forbidden items appearing therein, so long as they make it clear by satisfactory means, *i.e.*, covering up or roping off or adequate signs, that the latter items are not being offered for sale or to be sold.

On the basis of our conclusion that on the admitted facts relating to the nature of the business operation on Sunday,

Fass openly exposed goods barred from sale by L. 1959, Chapter 119, the judgment of conviction can be affirmed without more. But it does seem advisable to consider some further implications of the section 4 immunity for Sabbatarians in the framework of the 1959 act. As we have said, such persons, who are in the business of selling goods in the five excluded classes, cannot openly expose them to sale on Sunday. Since they can keep their stores open on Sunday for the sale of all other merchandise, did the adoption of Chapter 119 empty section 4 of all value? We think not.

Authorities have been alluded to above which sustained certain Sunday sales of goods. Such instances did not represent transactions occurring in a store that was open for the indiscriminate sale of merchandise to the public. They were private casual sales not associated with public exposure for sale, and not accompanied by disturbance of those seeking rest, relaxation and recreation on that day. Compare also, *Goldstein* v. *Vaughan*, 1 Q. B. 549 (1897). In our judgment such sales, appraised in the light of the 1959 act, reasonably appear to be, and we hold them to be, within the intendment of section 4. The immunity granted by that section therefore will protect a Sabbatarian so selling from prosecution.

The suggestion that the prohibition against open exposure to sale only bans sales in public markets maintained by or licensed or authorized as such by public authorities or in public places, is not tenable. We find no reasonable support in history, in other jurisdictions, or in the language for such a narrow construction. In the face of modern commercial life, such an interpretation would amount to no limitation of any consequence at all. A Sabbatarian could open his business on Sunday and freely engage in indiscriminate sale of goods to the public in the five classes banned by the 1959 act. It would be permissible to advertise in the public press that he would be open for trade on Sunday, to have large "Open" signs in his front windows on Sunday, to have such signs in neon lights, with arrows pointing to the

entrance doorway, and the like. And all this in a community or county where the people had voted to adopt L. 1959, Chapter 119. Such practice cannot be said to reasonably represent the legislative intention in withholding the immunity in cases of open exposure of goods to sale.

Moreover, as Justice Frankfurter pointed out in *McGowan, supra*:

> "If it is assumed that the retail demand for • • • [the five classes of goods banned by the New Jersey Act of 1959] is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position, presumably, to complain of discrimination against *his* religion." 366 U. S., at p. 516, 81 S. Ct., at p. 1183, 6 L. Ed. 2d, at p. 450 (Emphasis Justice Frankfurter's, but bracketed substitution ours. Of course, the New Jersey Act was not involved in *McGowan*.)

Justice Frankfurter's observation is more strongly pertinent in the factual context of this case because Fass opens his store about 20 minutes after sundown on Saturday. Thus, if he has legislative permission to open on Sunday, he not only has the business advantage described in *McGowan* but the advantage is enhanced through his Saturday after sundown operation.

We know that for many centuries some people have devoutly and conscientiously believed the seventh day of the week to be the divinely ordained Sabbath. They have clung with unswerving fidelity to that belief through relentless persecutions and travail. We know, too, that such persons, who are engaged in the business of selling of articles in the five classes outlawed for public sale on Sunday in the 12 counties where Chapter 119 is effective, undoubtedly

suffer some economic loss. Recognition of these facts has impelled legislatures of 21 of the 34 states, which have statutes banning labor or employment or the selling of goods on Sunday, to grant some mitigating exemption. But as Justice Frankfurter observed, in his concurring opinion in *McGowan*, in less than half of these 21 states was the exemption extended to sales activity as well as to labor. 366 U. S., at p. 513, 81 S. Ct., at p. 1182, 6 L. Ed. 2d, at p. 449. In England an exception, including a limited right to sell, has been established. It is subject to regulation with administration thereof substantially in the hands of representatives of the Sabbatarians themselves. See 17 Halsbury's Laws of England (3d Ed. 1956), pages 207-09; n. (e), p. 209. Under our tripartite system of government the nature and extent of any exemption within constitutional limits is a matter of policy for the Legislature. Courts have no such creative power whatever their views may be as to the desirability of some form of relief. Awareness of limitations on the judicial function evoked this comment from the New York Court of Appeals in *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950):

> "We are bound to construe statutes as we find them and may not sit in review of the discretion of the Legislature or determine the expediency, wisdom or propriety of its action on matters within its powers * * *. A plea that a statute imposes inconvenience or hardship upon a litigant should be addressed to the Legislature; we may not usurp its functions by legislating judicially." 96 N. E. 2d, at pp. 185-86.

See also *McGowan* v. *State of Maryland* (concurring opinion), 366 U. S., at p. 522, 81 S. Ct., at p. 1187, 6 L. Ed. 2d, at p. 454; *Braunfeld* v. *Brown*, 366 U. S., at p. 607, 81 S. Ct., at p. 1148, 6 L. Ed. 2d, at p. 569

If, perchance, we have misconstrued the language of section 4, or misapprehended the intention of the Legislature

in retaining it, particularly in the 1937 and 1951 revisions, having in mind the sensitive problem involved, we trust that the lawmakers will review and rephrase it so as to leave no doubt as to the nature of the exemption provided.

Under all of the circumstances, the undisputed facts in this case warranted the finding of the County Court that Fass had openly exposed his merchandise to sale on the Sunday specified, and that section 4 of the act does not provide him with immunity from prosecution.

The judgment is affirmed.

WEINTRAUB, C. J. (dissenting). I agree the Federal and State constitutions do not require an exemption in favor of those who observe the seventh day. The Legislature may make a policy decision for or against an exclusion. Reasons exist for a decision either way. Our Legislature struck a balance and decided in favor of members of minority faiths when it enacted the Sunday Closing Act of 1798, Paterson's Laws, p. 329. The provision now appears in N. J. S. 2A:171-4. It reads:

> "If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the exercise of religious worship, and if the work or labor for which such person is informed against was done and performed in his dwelling house or workshop, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise or other article or thing in the line of his business or occupation."

The exemption is tightly worded to avoid spurious claims of religious devotion on the seventh day. For one who meets that exacting test, the exemption is granted, subject to the proviso that he "has not disturbed other persons in the observance of the first day of the week as the Sabbath," and to the provisions of the sentence which follows. That sentence, upon the meaning of which the decision in this case depends, reads:

> "This section shall not be construed to allow any such person to *openly* expose to sale on Sunday any goods, wares, merchandise or other article, or thing *in the line of his business or occupation.*" (Emphasis added)

The phrase "in the line of his business or occupation" serves merely to describe the individuals affected; that is, the sentence applies only to those who are engaged in the business or occupation of selling the article involved. It is a person so engaged who may not "*openly* expose to sale" the articles he vends in his regular, gainful pursuit. The key to the present case is "openly"; and the question is whether it means (1) in public places or (2) includes also any private place to which members of the public are invited as customers.

There appears to be no statute in any state using the expression "*openly* expose to sale" and hence decisions elsewhere are not helpful. Unfortunately the official records of the 1798 statute as well as other sources of light are meager. I gather from a fairly elaborate news account (State Gazette and New Jersey Advertiser, February 20, 1798) that the exemption was proposed as a matter of fairness to the seventh-day observer, and that the sole pertinent objection there reported was that the exemption as a whole "would much interrupt persons who went to church, and particularly if in businesses where forges, etc., are used near a place of worship." The exemption, as adopted, guards against that

type of interference in express terms, *i.e.*, "has not disturbed other persons in the observance of the first day of the week as the Sabbath." Whether that phrase and the sentence relating to exposure to sale were in the bill as originally introduced or were later added, we cannot know.

In any event, we can be satisfied that the exemption was made to avoid the obvious hardship upon the seventh-day observer, who would be restrained by law from pursuing his livelihood on one day and by his religious tenets on still another day. We know also that in 1798, as indeed today in a more limited way, wares were vended in public areas as well as upon private property. There were public market places and itinerant hawkers, the latter irritating their resident competitors then as they still do. See Wright, Hawkers and Walkers in Early America 84 (1927). With this backdrop, we must find what was meant by "openly" in the phrase "openly expose to sale."

It seems clear that if the Legislature intended to prohibit exposure to sale in *all* places, *i.e.*, upon private property as well as in public ways and places, it would have achieved that aim by simply barring "exposure to sale * * * in the line of his business or occupation." The word "openly" thus limits "exposure to sale * * * in the line of his business or occupation" to something less than all such exposures to sale. The majority opinion gives no effect to the word "openly." It is a cardinal rule that meaning must be given to all words in a statute if at all possible. Especially must that be true in this case, since the word "openly" cannot be deemed an inadvertent redundancy. The expression "openly expose to sale" is not a popular usage; it cannot be explained away as a commonplace verbal oddity. Indeed, no Sunday statute of another state uses the term. Hence we should conclude our Legislature used "openly" with deliberateness, to express an intended limitation upon "expose to sale." This is fortified by the fact that elsewhere in the same statute the Legislature used "expose to sale" without

the word "openly" in a provision reading "that no person shall cry, shew forth, or expose to sale, any wares, merchandise, etc." The appearance of "openly" in the exemption to qualify "expose to sale" indicates the word was consciously used. Hence we should give effect to the word unless the sense of the situation makes it impossible or plainly absurd.

There is nothing in the context of the statute or in the external setting which compels us to find that "openly" added nothing to the text. Sunday-closing is a touchy subject. It involves a nice adjustment among contending interests. It is plain the Legislature was concerned with the impact upon the seventh-day observer, and sought a formula which would fairly reconcile his needs with those of the Sunday observer. It concluded that all should be permitted to pursue their callings on a total of six days. It added a restraint against "disturbing" other persons "in the observance of the first day of the week as the Sabbath," an expression which connotes interference with religious exercises. It added a restraint with respect to selling, an operation capable of such interference in different degrees in different places. It struck a balance by prohibiting exposure to sale "openly," while permitting exposure to sale which falls beyond that description.

It seems to me that in the context of this statute, "openly" can have but one of two meanings. It may describe the manner in which the act is done, in which sense it would be the antonym of "furtive" or "concealed." This view of the word does not seem appropriate. The merchant would hardly know what he could do if penal liability depended upon the degree of privacy or secrecy he achieved in his transactions. The standard would be unworkable. It would also be something less than a meaningful exemption for one whose livelihood depends upon sales.

On the other hand, "openly" may refer to the *place* of exposure to sale, meaning "in the open," and thus differ-

entiating the public ways and places from the private business premises. A line so drawn would make sense. We must remember the Legislature sought to relieve a member of a minority faith who because of his devotion to its demands would, but for an exemption, be injured in his livelihood. It was a matter of weighing the needs of the very limited number who could qualify for the exemption against the amount of disquiet they might generate by their selling activities. The statute itself evidences a concern for disturbance of others in their observance of Sunday as the Sabbath. As I have said, interference of that character varies in degree with the places of activity. A decision to bar selling only from public ways and places surely cannot be said to be absurd. Indeed, I think "openly" was intended to draw precisely that line.

Even if "openly" could refer to the manner of selling as readily as it does to the place of sale, I would take the latter view. A statute which has an impact, albeit indirect, upon religious faiths should be strictly construed. When I say "strictly," I do not mean a court should obstruct the legislative purpose with private notions of its own. Rather I mean that since respect for the faiths of others in so high in our social conscience, we should assume the Legislature intended no impingement beyond the inevitable meaning of its words, and hence that if a statute is so phrased as to invite the hazard of judicial misconception, it is better to hold the statute to the minimum restraint consistent with its terms. In this delicate area a court should be certain that it is not attributing to the Legislature a burden upon minority groups which that branch of government did not intend.

Since the facts disclose that individuals other than Fass were engaged in Sunday selling at his place of business, I should note that only Fass was here charged. We do not know the religious views and habits of the others, and their amenability to the statutory prohibition is not here involved.

I would reverse the conviction.

JACOBS, J. (dissenting). During oral argument the State acknowledged that the word "openly" in the statute was not to be ignored but was to be given meaning. Though it did not define them, it conceded that some Sunday sales on the premises by the defendant would not be violative of the statute. The concession has been ignored and the majority has given no effect whatever to the word "openly"; it seems to me that this departs from well settled principles of statutory construction. See *Hoffman* v. *Hock*, 8 N. J. 397, 406 (1952); *O'Rourke* v. *Board of Review*, 24 N. J. 607, 610 (1957); *In re General Assignment for Benefit of Creditors Xaviers, Inc.*, 66 N. J. Super. 561, 576 (App. Div. 1961); *Evans* v. *Ross*, 57 N. J. Super. 223, 229 (App. Div. 1959), certif. denied 31 N. J. 292 (1959). The dissenting opinion by the Chief Justice seeks to give fair meaning to the word and I subscribe to the conclusion he has reached. Since that leads me to a reversal of the defendant's conviction I find no present occasion for dealing with the existence and scope of any constitutional requirements that seventh day observers be afforded exemptions from Sunday legislation. See Brennan and Stewart, JJ., dissenting in *Braunfeld* v. *Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563, 579 (1961).

SCHETTINO, J. (dissenting). As I have previously indicated by my concurrence in Mr. Justice Francis' dissent in *Two Guys from Harrison* v. *Furman*, 32 N. J. 199 (1960), my opinion is that section 1 of Chapter 119, L. 1959, N. J. S. 2A:171-5.8 is violative of the equal protection clause of the Federal Constitution. The recent decisions of the United States Supreme Court in *McGowan* v. *State of Maryland*, 366 U. S. 420, 81 S. Ct. 1153, 1218, 6 L. Ed. 2d 393 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 81 S. Ct. 1185, 6 L. Ed. 2d 551 (1961); *Braunfeld* v. *Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961); and *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961), do not

appear to me to dispose of this question in view of the absence of a general New Jersey statute designed to set aside Sunday as a day of rest and relaxation. See Mr. Justice Francis' discussion on that point, 32 N. J., at pp. 253-255. If this position is sound, the statutory basis for the instant conviction is void and we do not reach the question of its effect upon defendant's right to the free exercise of his religion.

Assuming, however, that the statute is constitutional, Fass falls within the exception enacted for the benefit of Sabbatarians, N. J. S. 2A:171-4. On this issue, I concur in the opinion of Chief Justice WEINTRAUB as to his interpretation of "openly expose to sale."

For affirmance—Justices FRANCIS, PROCTOR, HALL and HANEMAN—4.

For reversal—Chief Justice WEINTRAUB, and Justices JACOBS and SCHETTINO—3.

APPENDIX B.

Opinion of the Hudson County Court.

HUDSON COUNTY COURT

LAW DIVISION (CRIMINAL)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVE FASS,

Defendant-Appellant.

Decided June 30, 1960

Mr. JOSEPH L. FREIMAN argued the cause for the Defendant-Appellant.

Mr. DAVID M. SATZ, JR., Assistant Attorney General, argued the cause for the plaintiff-respondent (Mr. DAVID D. FURMAN, Attorney General; Mr. ROBERT S. MILLER, Deputy Attorney General, on the brief).

Mr. FRANK J. V. GIMINO, Assistant Prosecutor, also argued the cause for the plaintiff-respondent (Mr. LAWRENCE A. WHIPPLE, Hudson County Prosecutor).

DUFFY, J. C. C.

This is an appeal from a conviction in the West New York Municipal Court of the offense of selling carpeting on Sunday in violation of Chapter 119 of the Laws of 1959.

Opinion of the Hudson County Court.

The defendant is of the orthodox Jewish faith and observes Saturday as the Sabbath, keeping his store closed, abstaining from all recreation and devoting the day to the exercise of religious worship. As a consequence, he contends: (a) that he is entitled to the immunity allowed by N. J. S. A. 2A:171-4 in the case of seventh day observers; (b) that Chapter 119 of the Laws of 1959 is violative of the Fourteenth and First Amendments of the United States Constitution and Sections Four and Five of Article One of the New Jersey State Constitution.

The appeal was heard *de novo* on February 15 and 16, 1960. At the conclusion of that trial, I ruled adversely as to the defendant's claim of immunity as an observer of the Saturday Sabbath. From the evidence it was clear that the defendant did not come within the protection of N. J. S. A. 2A:171-4, which contains the following proviso:

> "This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise, or any other article or thing in the line of his business or occupation."

I determined as a matter of fact that the defendant had openly exposed the prohibited merchandise to sale on Sunday.

I reserved decision on the constitutional grounds urged by the defendant. The question of the general constitutionality of the statute was at the time pending in the New Jersey Supreme Court in the case of *Two Guys from Harrison, Inc.* v. *Furman*. The question of its religious validity was before the Federal District Court.

The opinion of the Supreme Court in *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199 (1960) is dispositive of the defendant's contention as to the general unconstitutionality of the statute. Furthermore, by its characterization of the statute as non-religious and non-sectarian, the Supreme Court has considerably weakened the thrust of

defendant's contention that the statute prohibits the free exercise of religion. Construed as a legitimate legislative exercise of the police power, the incidental or indirect hardship that the operation of the statute may occasion, even in the area of religion, must be weighed against the requirements of the general health, safety, morals and welfare of the community.

The defendant maintains that he is put under a competitive disadvantage with respect to his business rivals because his store is closed by reason of conscience on Saturday and legal sanctions on Sunday. He contends that his economic loss is so severe that he will be required either to yield his means of livelihood or compromise his religious convictions.

It seems to me, however, that when a person embraces the obligations of a religious sect, he is faced with the necessity of assuming the financial burdens which that choice entails. The "free" exercise of religion does not logically carry with it the proposition that the members of a sect shall not be called upon to make some financial sacrifice in its behalf. "Free" as used in the Federal and State constitutions is not synonymous with "at no cost". It signifies here rather an absence of government restriction or interference.

The case of *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) has been advanced by the defendant as an example of the invalidity of financial sanctions imposed upon the practice of religion. That case concerned a license tax imposed by a municipality on the distribution of religious literature. The Legislature, however, by its enactment of Chapter 119 of the Laws of 1959, did not interfere with or restrict the defendant's freedom to observe Saturday as a religious holiday. Any financial inconveniences arising from the voluntary cessation of business activities on a particular day are attributable to the citizen exercising his right to do so. In all probability, the observance of

other religious holidays of the orthodox Jewish faith may be the occasion of further economic or financial hardship. But this is not the concern of the State. In fact, any attempt to redress the situation in favor of the religious practitioner would undoubtedly fall squarely into that category of legislation interdicted by the First Amendment.

The United States Supreme Court in *Friedman* v. *New York*, 341 U. S. 907, declined to entertain a claim that the New York Sabbath Law was violative of religious freedom by virtue of its effect upon persons observing a day other than Sunday as their holy day of rest. Our Supreme Court in the *Two Guys from Harrison case*, *supra*, decided that Chapter 119 is not a law respecting an establishment of religion. After considering the evidence here presented, I am of the opinion that the statute in question is equally free of any constitutional infirmity in relation to freedom of religion.

I find the defendant guilty.

APPENDIX C.

Decision of the Hudson County Court.

HUDSON COUNTY COURT

LAW DIVISION (CRIMINAL)

STATE OF NEW JERSEY,
Plaintiff-Respondent.

v.

DAVE FASS,
Defendant-Appellant.

DECISION.

Jersey City, New Jersey
March 7, 1960

Before:

Honorable PAUL J. DUFFY, J. C. C.

Appearances:

For the State of New Jersey:

FRANK J. V. GIMINO, Esq., Assistant Prosecutor.

For the Defendant:

JOSEPH L. FREIMAN, Esq.

The Court: Dave Fass was convicted in the Municipal Court of West New York on December 17, 1959 for a violation of selling carpeting on Sunday, the violation being referrable to R. S. 2A:171-5.8 and 2A:171-5.10, and fined the sum of $25.00. He took his appeal to this court and the

appeal was heard *de novo* in this court on February 15 and 16, 1960.

At the end of the State's case and again at the end of the entire case defendant moved for a judgment of acquittal on the ground the statute in question is unconstitutional. He also claimed immunity from the penalty provided in the act by virtue of 2A:171-4. Briefs were ordered and counsel has now asked for an opportunity to re-argue the question of exemption under 2A:171-4.

The constitutional question involved is presently before our New Jersey Supreme Court. The defendant in addition to contending that the statute is unconstitutional argues that it is specially unconstitutional as to him because of religious reason. This question, I am informed by counsel, is presently before the United States District Court before a court of three judges. I am further informed that the Federal District Court is holding up its decision until the handing down of the decision by the New Jersey Supreme Court on the general constitutional questions. Because of the fact that the constitutional questions are so pending in our highest tribunal in this state and the second constitutional question with respect to the Federal Constitution is pending in the United States District Court, it would be inexpedient and fruitless for me to attempt to decide the constitutional questions on this appeal. I therefore reserve decision on the constitutional questions until the other tribunals have spoken.

We now come to the question of whether or not the defendant is not guilty by virtue of immunity provided by Section 2A:171-4. The testimony of the West New York detective upon which the conviction was based, that it, with respect to the selling on Sunday, also, indicated that the store is surrounded by glass panels which, of course, makes the interior of the store perfectly apparent to anyone who cares to look in. He also testified that the door was open. The defendant himself testified that his store is surrounded

by glass panels which makes the interior readily viewable by passersby and that he kept the curtains, if any, on the windows in exactly the same position as he kept them on regular week days when he was also open for business. Now, the defendant contends that he is not charged with openly exposing but that he is charged with selling and therefore he cannot be convicted of openly exposing. I think he misconceives the point at this juncture because the statute which charges him with selling and considers it a violation does not speak about openly exposing. The State does not have to negative the exemption of Section 4 heretofore referred to. That is a privilege and special defense open to the defendant himself.

I find and adjudge that the defendant is a holy man, that he has strict observance of the tenets of the orthodox Jewish faith. I find also, however, that he is not entitled to the exemption under Section 4 because of the last sentence in that section to wit: "This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise or other article or thing in the line of his business or occupation." I find and adjudge that on this particular Sunday in question he did openly expose for sale merchandise in his store and is therefore not entitled to the exemption provided in Section 2A:171-4.

Mr. Freiman: For the purpose of clarification, if your Honor please, so that we would know how to guide ourselves in the future, does your Honor find that he openly exposed for sale because of the fact that his windows were open and that people could look into the store?

The Court: And the fact that he had his door open or unlocked rather.

Mr. Freiman: And the fact that he had his door unlocked.

The Court: Yes. He was open for business and he was openly exposing his merchandise for sale. Now, I am not

going to tell you what you can do and cannot do. I only have to wait until you do something and somebody thinks it is illegal. Then when it finds its way here eventually I will have to tell you what I think. I cannot tell you in advance.

Mr. Freiman: I am merely asking the basis on which your Honor found that he openly exposed for sale.

The Court: Under the facts in this case the testimony is that he conducted his store business which is surrounded by glass panels giving ready viewpoint into the interior and the merchandise displayed therein. He handled his business on this particular Sunday just as he handled it on every week day business day. Now, that is as far as I can tell you, period.

Mr. Freiman: May we approach the bench?

The Court: Yes, sir.

(Inaudible discussing at sidebar.)

At the end of my determination of this matter from the bench counsel for the defendant asked me if I would make a finding on the constitutional question so that if it was adverse to him he would be in a position to take an appeal. I repeat that I do not think it appropriate for me to make a determination on the constitutional questions when such questions are already before the proper tribunals, including the highest tribunal in this state. I will say this, if it will assist defendant in his position, however, that I do find that if the appropriate tribunals find the statute is constitutional then I determine that the defendant is guilty. That is the best I can do for you.

APPENDIX D.

Judgment of Affirmance of the New Jersey Supreme Court. Mandate on Affirmance.

SUPREME COURT OF NEW JERSEY

APPEAL DOCKET NO. 3365.

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* DAVE FASS, Defendant-Appellant.	Criminal Action. On Appeal. Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. Joseph L. Freiman, counsel for the appellant, and Mr. Robert S. Miller, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Hudson County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Hudson County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the sixth day of November, 1961.

Filed
November 6, 1961

JOHN H. GILDEA
Clerk

s/ JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX E.

Order Denying Rehearing.

SUPREME COURT OF NEW JERSEY

DOCKET No. 3365.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

DAVE FASS,
Defendant-Appellant.

On Petition for rehearing.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 11th day of December 1961.

s/ JOHN H. GILDEA
Clerk

Filed
December 11, 1961

JOHN H. GILDEA
Clerk

Office Supreme Court, U.S.
FILED
APR 28 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 824

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

PAGE

Motion to Dismiss and Brief in Support Thereof:

Motion to Dismiss or in the Alternative to Affirm Summarily 1

Questions Presented 1

Statement of the Case 2

Point I—This appeal does not raise a substantial federal question because recent decisions of this Court establish that Chapter 119 is not violative of the Federal Constitution 5

A. The "Establishment" Clause of the First Amendment 5

B. The "Free Exercise" Clause of the First Amendment 7

C. The Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment 8

Point II—The interpretation of N.J.S. 2A:171-4 is a matter of State law and raises no substantial federal question 10

Conclusion 12

Cases Cited

Braunfeld v. Brown, 366 U. S. 599 (1961) 2fn, 4, 7, 8

Gallagher v. Crown Kosher Super Market, 366 U. S. 617 (1961) 2fn, 8

McGowan v. Maryland, 366 U. S. 420 (1961) 2fn, 4-8, 11

PAGE

State v. Fass, 36 N. J. 102, 175 A. 2d 193 (1961) . . . 3, 8, 9, 11

Two Guys from Harrison, Inc. v. Furman, 32 N. J. 199, 160 A. 2d 265 (1960) 2, 3, 6, 9

Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582 (1961) 2fn, 8, 9

State v. Monteleone, 36 N. J. 93, 175 A. 2d 207 (1961) 3

United States Constitution Cited

First Amendment 2-8

Fourteenth Amendment 2, 8

Statutes Cited

L. 1959, Ch. 119 (New Jersey Sunday Closing Law) 2, 3, 3fn, 4, 5, 5fn, 6, 7, 7fn, 8-12

N.J.S. 2A:171-4 . . . . . 4, 10, 11

N.J.S. 2A:171-5.8 . . . . . 2, 5fn, 7fn

N.J.S. 2A:171-5.10 3

N.J.S. 2A:171-5.12 2

Pennsylvania Sunday Closing Law 7-9

Sunday Closing Act (1798) 10

Texts Cited

Paterson's Laws:

p. 329 10

18 Purdon's Pa. Stat. Ann.:

Sec. 4699.10 . . . . . 7fn

"Sunday Legislation", 73 Harv. L. Rev. (1960):

pp. 729, 733, 743, ns. 47, 91 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. _____

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

Motion to Dismiss or in the Alternative to Affirm Summarily

The State of New Jersey moves to dismiss this appeal, on the ground that no substantial federal question is presented, or, in the alternative, to affirm the judgment below summarily, on the ground that said judgment is so clearly correct on the merits that no further argument is required.

Questions Presented

1. Does appellant, a retailer who closes his shop to observe a Saturday Sabbath, raise a substantial federal question in challenging the New Jersey Sunday Closing Law in view of the recent decisions of this Court?

2. Does the interpretation of the New Jersey Sunday Closing Law by the Supreme Court of the State of New Jersey that appellant's commercial activities constitute an open exposure to sell goods disentitling appellant to the immunity otherwise granted to Sabbatarians, raise a substantial federal question or does it involve purely a matter of State law?

Statement of the Case

The New Jersey Sunday Closing Law, Chapter 119 of the Laws of 1959, N.J.S. 2A:171-5.8 *et seq.*, was enacted by the New Jersey Legislature on June 17, 1959. In accordance with N.J.S. 2A:171-5.12 the law is only operative in those counties which approve it by referendum. The law is currently operative in thirteen of New Jersey's twenty-one counties.

The initial challenge to the validity of Chapter 119 was presented to the New Jersey Supreme Court in *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960). It was contended in that case that the Sunday Closing Law violated the "Establishment" Clause of the First Amendment and the "Equal Protection" Clause of the Fourteenth Amendment of the Federal Constitution. the court rejected these very contentions and upheld the validity of Chapter 119.

Subsequent to the determination of *Two Guys from Harrison* v. *Furman*, *supra*, this Court in four separate cases considered the constitutionality of the Sunday Closing Laws of the states of Maryland, Massachusetts and Pennsylvania.[1] This Court held that each of these State

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[1] *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Two Guys from Harrison-Allentown Inc.* v. *McGinley*, 366 U. S. 582 (1961); *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617 (1961); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961).

Sunday Closing Statutes was valid under the Federal Constitution. In essence, the Sunday Closing Statutes upheld by this Court are comparable to the New Jersey Sunday Closing Law involved herein.

Following the decisions of this Court upholding the constitutional validity of the Sunday Closing Statutes, the New Jersey Supreme Court again considered the constitutional validity of the New Jersey Closing Law in two separate cases. In *State* v. *Montelcone*, 36 N. J. 93, 175 A. 2d 207 (1961) it was contended that Chapter 119 is so vague and unclear as to deprive the appellants therein of liberty and property in violation of the State and Federal Constitutions. Additionally, the appellants sought to challenge the conclusions of the New Jersey Supreme Court, previously rendered in *Two Guys from Harrison* v. *Furman*, *supra*. The court rejected appellants' contentions and held that the New Jersey Sunday Closing Law was valid and violated no provision of the State or Federal Constitutions.

In *State* v. *Fass*, 36 N. J. 102, 175 A. 2d 193 (1961), the case *sub judice*, the appellant raised the question of whether the Sunday Closing Law impinged upon the freedom of those who observed religiously the seventh day of the week, contrary to the First Amendment of the Federal Constitution. The appellant, Fass, is a member of the Orthodox Jewish faith and, in keeping with the tenets of his religion, he abstains from his usual business or occupation on the seventh day of the week and devotes himself exclusively to religious worship. Fass operates a store for the retail sale of floor coverings in West New York, New Jersey.[2] Floor coverings are specifically included as "home furnishings" within the Sunday sale ban, N.J.S. 2A:171-5.10. The

[2] West New York is located in Hudson County which has adopted the Sunday Closing Law by referendum.

appellant was charged with violation of Chapter 119 of the Laws of 1959 and was found guilty and sentenced to pay a fine of $25.00 and costs in the Municipal Court of West New York. This conviction was affirmed at trial *de novo*, in the Hudson County Court, Law Division. Fass appealed to the Appellate Division of the Superior Court and prior to argument the New Jersey Supreme Court certified the matter.

The New Jersey Supreme Court affirmed the conviction below. The court held, upon the authority of *Braunfeld* v. *Brown* and *McGowan* v. *Maryland, supra,* that the New Jersey Sunday Closing Law did not contravene appellant's constitutional rights under the First Amendment of the Federal Constitution and that appellant's activities constituted an open exposure to sell his merchandise in the usual course of his business and he was, therefore, not entitled to the immunity from Sunday closing otherwise accorded Sabbatarians by N.J.S. 2A:171-4.

POINT I

This appeal does not raise a substantial federal question because recent decisions of this Court establish that Chapter 119[3] is not violative of the Federal Constitution.

A. The "Establishment" Clause of the First Amendment

Appellant now contends that the New Jersey Sunday Closing Law violates the "Establishment" Clause of the First Amendment. He states that "The prohibition against work is definitely a form of worship" and a recognition that Sunday "is a day of holy convocation".

This Court in *McGowan* v. *Maryland*, *supra*, 366 U. S. 453, in considering the Maryland Sunday Closing Law, stated that Sunday closing legislation does not violate the "Establishment" Clause of the Federal Constitution unless it can be demonstrated that the purpose or operative effect of the legislation is to use or invoke the coercive power of the state to aid religion.

Appellant argues that the Sunday statutes were enacted originally in the Colonies solely to achieve sectarian ends. If this be true, it is of no moment. The pertinent inquiry

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[3] Chapter 119, Laws of 1959, N.J.S. 2A:171-5.8, which is set forth in appellant's Jurisdictional Statement on page 4 is not accurately quoted. This section provides:

> "On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, to sell, attempt to sell or offer to sell or to engage in the business of selling, as hereinafter defined, clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings, household, business or office appliances, except as works of necessity and charity or as isolated transactions not in the usual course of the business of the participants."

is whether Chapter 119 of the Laws of 1959 was in fact enacted to aid or subserve religious interests. The Supreme Court of New Jersey in *Two Guys from Harrison* v. *Furman, supra*, 32 N. J. 215, 160 A. 2d 273 in response to a contention, similar to that raised in *McGowan, supra*, that Chapter 119 is a religious statute violating the "Establishment" Clause of the First Amendment, stated:

> "• • • The fact is that Sunday has acquired a special character differentiating it from the other days of the week and this without reference to religious connotation. Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance, it is a secular holiday, a day for play, hobbies, recreation or relaxation. To still others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning."

The court further emphasized that it is within the police power of the state to protect from unreasonable interference the opportunity of the public to find relief from everyday tensions.

It is, therefore, clear that there exists secular justifications for making Sunday a day of rest. As indicated in *McGowan, supra*, at page 435, New Jersey Sunday legislation has been supported by groups other than those with purely religious interests.

In view of the explicit determination of the New Jersey Supreme Court with respect to the purpose and operative effect of Chapter 119 and the holding of this Court in *Mc-*

Gowan, appellant's assertions that Chapter 119 contravenes the "Establishment" Clause of the Federal Constitution cannot be sustained.

B. The "Free Exercise" Clause of the First Amendment

The recent case of *Braunfeld* v. *Brown*, 366 U. S. 599 (1961) dealt with the very issues raised by the appellant. Fass, like Braunfeld, closed his doors on Saturday. Fass, like Braunfeld, alleges that the Sunday Closing Law would so impair his ability to earn a livelihood that it would necessitate his discontinuing in business. As a result, Fass, like Braunfeld, alleges that the statute denies the free exercise of religion as guaranteed by the First Amendment of the United States Constitution. This Court squarely decided the issue against Braunfeld. It stated at 366 U. S. 605:

> "* * * [t]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity * * *."

The Pennsylvania Sunday Closing Law which was involved in *Braunfeld* has a marked similarity to the New Jersey Sunday Closing Law.[4]

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[4] The following items are proscribed under the Sunday Closing Laws of New Jersey and Pennsylvania:

L. 1959, c. 119 (N.J.S. 2A:171-5.8)

1. clothing or wearing apparel
2. building and lumber supply materials
3. furniture
4. home or business or office furnishings
5. household, business or office appliances

18 Purdon's Pa. Stat. Ann. §4699.10

1. clothing or wearing apparel
2. building and lumber supply materials
3. furniture
4. home or business or office furnishings
5. household, business or office appliances
6. hardware, tools, paints, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, toys, housewares, clothing accessories

The New Jersey Supreme Court rendered its decision in *State* v. *Fass*, 36 N. J. 102, 175 A. 2d 193 (1961), subsequent to this Court's opinions in *McGowan*; *Crown Kosher Super Market*; *Two Guys from Harrison—Allentown* and *Braunfeld*. In light of these determinations, additional briefs and reargument were presented to the New Jersey Supreme Court. The Court in *Fass, supra*, 36 N. J. 106, 175 A. 2d 194 cited *McGowan* and *Braunfeld* as controlling and held that Chapter 119 does not make unlawful any religious practices of the appellant, but that the law simply regulates a secular activity.

In view of the holding of the New Jersey Supreme Court in *Fass* and this Court's decisions in the foregoing cases, appellant's contention that Chapter 119 violates the "Free Exercise" Clause of the First Amendment of the Federal Constitution must be rejected.

C. The Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment

Appellant merely states, "The classification of goods and merchandise is so illusory, arbitrary and capricious that it deprives the defendant of his liberty and property" in violation of the "Equal Protection" Clause of the Fourteenth Amendment of the Federal Constitution. In *McGowan* v. *Maryland*, *supra*, 366 U. S. 425, this Court recognized the wide scope of discretion to be given states in establishing classifications under Sunday closing statutes. In rejecting the contention that the Maryland statute violated the "Equal Protection" Clause, this Court reiterated the doctrine that if any facts may reasonably be conceived to justify the legislative classification, the statute must be upheld.

This Court has already considered the legislative classifications of the Pennsylvania Sunday closing statute in

Two Guys from Harrison-Allentown, supra. It is significant that the classification of commodities under the Pennsylvania statute closely parallels the classification under the New Jersey Sunday Closing Law. (See note 4, *supra.*) Apparently both states have acted to meet similar problems.

In *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 590 (1961), it was found that substantial retail businesses were opening on the highways, and the very commodities enumerated in the Pennsylvania Sunday closing statute were the principal categories of merchandise sold in these establishments. Likewise, the New Jersey Supreme Court stated in *Two Guys from Harrison, Inc.* v. *Furman, supra*, 32 N. J. 209, 160 A. 2d 270:

> "• • • Retail operations spread rapidly upon highways and Sunday selling mounted dramatically. The urban merchant could not effectively meet the challenge. The major roads, already burdened by non-commercial travel, strained under the added stress."

The court further held that the Legislature may classify based upon such considerations as the amount of traffic, noise or other bustle which the sale of these commodities engendered. The evil to which the Legislature has addressed itself was determined by the New Jersey Supreme Court to be the unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose.

In view of the foregoing decisions, the New Jersey Supreme Court, in the instant case, properly determined that appellant's contention that the Sunday Closing Law violated the "Equal Protection" Clause has been foreclosed. The court so stated at 36 N. J. 109, 175 A. 2d 197:

> "The effect of the four Federal cases to which we have referred and the concordant majority decision of this court in *Two Guys from Harrison* v. *Furman*, *supra*, is to establish that L. 1959, Chapter 119, does not deprive retail merchants of equal protection of law."

This Court must reject appellant's argument that there is a violation of equal protection by Chapter 119 in view of its own decisions and that of the New Jersey Supreme Court.

POINT II

The interpreation of N.J.S. 2A:171-4 is a matter of State law and raises no substantial federal question.

The New Jersey Sunday Closing Law, N.J.S. 2A:171-4, grants immunity to Sabbatarians. This immunity first appeared in the general Sunday Closing Act of 1798, *Paterson's Laws*, p. 329, and the language has been carried forward through successive legislation without substantial change. It provides:

> "If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the exercise of religious worship, and if the work or labor for which such person is informed against was done and performed in his dwelling house or workshop, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares,

merchandise or other article or thing in the line of his business or occupation."

Appellant's immunity, therefore, depends upon the nature of this exception and more specifically whether he "openly" exposed "to sale" goods "in the line of his business or occupation".

It was the contention of Fass that the immunity is granted to all Sabbatarians except those who sell their goods by hawking or crying them in the public streets or by maintaining open stands on the public streets or sidewalks. The New Jersey Supreme Court in *Fass, supra*, 36 N. J. 102, 175 A. 2d 193, held that it was not the intention of the New Jersey Legislature in N.J.S. 2A:171-4 to grant immunity to one who opens his store or shop to the public on Sunday for the ordinary operation of the business regularly conducted therein. Moreover, the court emphasized that the immunity section, N.J.S. 2A:171-4, may proscribe the actual sale of a commodity in the line of one's business even if it were not openly exposed to sale. [*See also* concurring opinion of Justice FRANKFURTER in *McGowan* v. *Maryland*, *supra*, 366 U. S. 515, n. 103; "Sunday Legislation", 73 *Harv. L. Rev.* 729, at p. 733 & n. 47; 743 & n. 91 (1960).]

Additionally, it is appropriate to bring before this Court the fact that the appellant has never contended throughout the various State courts and proceedings that he has been denied due process by virtue of his conviction. The first such assertion appeared in appellant's Petition for Rehearing before the New Jersey Supreme Court where it was stated that the immunity section is so vague that it contravenes due process. The appellant has not been timely in raising this issue.

In view of the foregoing, appellant's argument that the immunity provision of the New Jersey Sunday Closing

Law should be construed to embrace all Sabbatarians except those who hawk or cry their wares is purely a matter of interpretation of State law. It involves no substantial or meritorious federal question and should not be considered by this Court.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully requests that this appeal be dismissed, or in the alternative, that the judgment below be summarily affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 824.

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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TABLE OF CONTENTS.

	PAGE
Counter Statement of the Case	1
POINT I.—The Sunday Law decisions in this Court do not affect Chapter 119 of the Laws of 1959	2
POINT II.—The Statute Violates the Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment	3
POINT III.—The interpretation of N. J. S. 2A:171-4 is a denial of due process	5
CONCLUSION	6

TABLE OF CASES.

McGowan vs. *Maryland*, 366 U. S. 420 (1960)	2
Two Guys from Harrison v. *Furman*, 32 N. J. 199 (1960)	1, 4

STATUTES.

2A:171-1 to 2A:171-12	1, 2, 5
2A:171-5.1 to 5.18	1, 2

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DAVE FASS,

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THE STATE OF NEW JERSEY,

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Appellant herewith files his brief in opposition to the motion to dismiss his appeal.

Counter Statement of the Case.

The State's reference to Chapter 119 of the Laws of 1959 as the New Jersey Sunday Closing Law is incorrect.

The Title of Chapter 171 Title 2A of the Revised Statutes of New Jersey is "Observance of Sabbath Days." It contains 12 subsections (2A:171-1 to 2A:171-12). Chapter 119 of the Laws of 1959 is part of the 5th subsection, (2A:171-5.1 to 5.18).

In *Two Guys from Harrison* v. *Furman*, 32 N. J. 199 (1960) the New Jersey Supreme Court held (p. 225) that "Chapter 119 repealed and superseded the inconsistent

policy contained in 2A:171-1, 2 and 6 to 12.'"[1] Thus, as stated in the Jurisdictional Statement, (p. 10) New Jersey no longer has a general Sunday law.

POINT I.

The Sunday Law decisions in this Court do not affect Chapter 119 of the Laws of 1959.

This Court specifically pointed out in *McGowan* vs. *Maryland*, 366 U. S. 420 (1960) at p. 453:

> "Finally, we should make clear that this case deals only with the constitutionality of Section 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the 'Establisment' Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."

In addition to the argument set out in the Jurisdictional Statement, it should be noted that Chapter 119 specifically states that, "This act shall be construed as an additional remedy *to secure proper Sunday observance* * * *" (italics mine)[2].

Proper Sunday observance can mean only one thing—religious observance.

This statute thus fits directly into the language above quoted from *McGowan* v. *Maryland*, *supra*. Its violation of

[1] 2A:171-1 reads as follows: No worldly employment or business, except works of necessity and charity, shall be performed or practiced by any person within this state on the Christian Sabbath or first day of the week, commonly called and hereinafter designated as Sunday.

[2] 2A:171-5.11 (p. 5 of Jurisdictional Statement).

the "Establishment" Clause is evidenced both on the face of the legislation and in its operative effect.

In view of the fact that New Jersey no longer has a general Sunday Law and, also, that the statute *sub judice* specifically provides an additional remedy to secure proper Sunday observance, it thus runs afoul the First and Fourteenth Amendments of our Constitution. The previous Sunday Law decisions in this Court are not applicable.

POINT II.

The Statute Violates the Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment.

The statute does not affect all merchants—only those who sell the five prohibited categories of merchandise. Neither does it affect all merchants who sell such merchandise—only those who do business in thirteen of the twenty-one counties of the State.

In addition thereto, there is no rhyme nor reason for the classification. Merely to set out the list of articles prohibited from selling as against those permitted would show the arbitrariness of the statute. For example, a doll carriage may be sold but not a baby carriage; golf shoes may be sold but not dress shoes; supplies for an auto or a garden may be sold, but not supplies for the house; automobile radios may be sold but not house radios; yard goods may be sold but not any finished product made from these yard goods; birds may be sold but not bird cages; seat covers for an automobile may be sold but not slip covers for a sofa; wall paper paste and wall paper brushes may be sold but not wall paper; dog collars and chains may be sold but not baby diapers; ski boots, ice skates and baseball mits may be sold but not handkerchiefs; a

pair of pliers, a hammer and a wrench may be sold but not nails, screws or bolts; a gasoline can may be sold but not a laundry basket; cheesecloth may be sold but not sheets, pillow cases or towels; disposable vacuum cleaner bags may be sold but not cloth vacuum cleaner bags; paint rollers and trays may be sold but not bread boxes; flashlights and charcoal lighter may be sold but not electric light fixtures; glue may be sold but not plaster or cement, and so on *ad infinitum*.

This list clearly demonstrates how arbitrary and unreasonable is the statute *sub judice*.

Counsel for the appellee claims (page 9 of his brief) that the New Jersey Supreme Court held that the legislature may classify based upon such considerations as the amount of traffic, noise or other bustle which the sale of these commodities engender and infers that the statute was posed to curb highway selling. The fact is that this statute did not close any of the highway stores, for they still sell all the permitted articles and the traffic is just as heavy now as it was formerly.

The New Jersey Supreme Court also held that the evil to which the legislature addressed itself was the unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose. The fallacy with this is that this statute affects only a small minority of our citizens, for, as Justice Francis said in his dissenting opinion in *Two Guys from Harrison* vs. *Furman*, *supra*, page 239:

> ". . . Thus, it may be estimated that only approximately 8.9% of the New Jersey labor force are subjected to the Sunday ban. And on recalling that the referendum as to whether the 1959 act should apply in a particular county appeared on the ballot

> in only 15 of our 21 counties, and that it failed of adoption in three of them, it becomes obvious that the percentage of workers affected is even less than 8.9%. Consequently, the prescribed day of rest is provided for these relatively few workers because their employers cannot sell articles in the five categories specified."

In view of the foregoing it seems to be definitely established that the classification in the statute is arbitrary, unreasonable and violates the equal protection clause of the Fourteenth Amendment.

POINT III.

The interpretation of N. J. S. 2A:171-4 is a denial of due process.

As to this point appellant relies on his argument as stated in the jurisdictional statement.

The State, however, raises the question that the appellant never contended that he had been denied due process by virtue of his conviction. Appellant always contended that this section gives him immunity and, if the Court had adopted the construction as set forth in the dissenting opinion of Chief Justice Weintraub, the statute would not have been vague at all. However, the Court in its majority opinion put a forced construction on the words "openly exposing" and admitted in its opinion that the phrase was vague for, as it said in its opinion, 36 N. J. at p. 121:

> "If, perchance, we have misconstrued the language of section 4, or misapprehended the intention of the Legislature in retaining it, particularly in the 1937 and 1951 revisions, having in mind the sensitive

> problem involved, we trust that the lawmakers will review and rephrase it *so as to leave no doubt as to the nature of the exemption provided.*" (Emphasis mine.)

As soon as appellant became aware of the forced construction placed by the majority of the New Jersey Supreme Court, which construction rendered the exclusion vague, he applied for rehearing specifically on that ground and the rehearing was denied.

It is also to be noted that in appellant's original brief and appendix before the New Jersey Supreme Court he said on page 17:

> ". . . If, however, Section 4 does not grant the immunity claimed by this defendant, the act is unconstitutional as against him and must be struck down."

It is therefore respectfully submitted that the Appellant has been timely in raising this issue and that, this being a criminal case, it should be considered by this court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss be denied and that this Court should note probable jurisdiction as prayed for in the jurisdictional statement.

Respectfully submitted,

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